

# ARKANSAS: A POLITICAL CULTURE THAT RESPECTS LIFE

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Arkansas is a solidly pro-life state which has enacted a statutory scheme designed to protect life to the fullest extent possible in light of *Roe v. Wade* and its progeny. The state has consistently passed legislation that takes advantage of every possible avenue to discourage or prohibit abortion. Arkansas' legislation is a model for other pro-life states.

Considering its strong pro-life legislation, there have been surprisingly few legal challenges to Arkansas' legislative efforts to protect life. When such challenges have arisen, the elected judiciary has been reluctant to overrule the legislature and has often avoided addressing substantive issues, resolving cases instead on procedural grounds. However, there are troubling signs of a more activist trend developing in the court, and it remains to be seen whether or not the electorate will take notice and refuse to re-elect the more activist judges.

## I. LIFE ISSUES

Arkansas law protects life through both its Constitution and through a statutory framework that heavily regulates the medical industry as it relates to life issues.

### **Abortion**

The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.<sup>2</sup> *Aka v. Jefferson Hosp. Ass'n, Inc.*, ruled that, according to federal constitutional interpretation, the state's interest in protecting the life of a fetus begins at viability.<sup>3</sup> In that case, a wrongful death action was brought on behalf of a woman and her unborn child. Essentially, appellant's complaint alleged that the defendant doctors' and institutions' medical negligence in unnecessarily inducing his wife's labor, failing to discontinue the induction, failing to perform a cesarean section, failing to resuscitate her or the

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<sup>2</sup> Ark. Const. Amendment 68, § 2.

<sup>3</sup> 344 Ark. 627 (Ark. 2001).

unborn baby, and failing to obtain informed consent, proximately caused the death of the woman and her unborn son.

The court in *Jefferson* held that a wrongful death action could be brought on behalf of an unborn child. In doing so, the court overruled the prior decision in *Chatelain v. Kelley*.<sup>4</sup> In *Chatelain*, the court stated that as they had found in previous cases that a fetus is not a person in the context of a probate action<sup>5</sup> or a wrongful death action.<sup>6</sup> The *Chatelain* court thus concluded that for an unborn child to be considered as a person for purposes of the wrongful death statute without clear legislative intent to do so would create an inconsistency in the law.<sup>7</sup> By requiring something more specific from the legislature with regard to the wrongful death statute<sup>8</sup>, the court glossed over Amendment 68 of the Arkansas Constitution, which clearly states that the “policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”

The *Jefferson* court got around this precedent by noting that, at the time *Chatelain* was decided, Amendment 68 had been held unconstitutional by the federal courts,<sup>9</sup> and that subsequently the United States Supreme Court ruled that the amendment was unconstitutional only to the extent that it attempted to preempt federal law by preventing Medicare funding for abortion.<sup>10</sup> Therefore, Amendment 68 remains a compelling expression of Arkansas's public policy "to the extent" that it does not violate federal law, and it remains an accurate reflection of how the court should interpret the Arkansas Wrongful Death Statute.<sup>11</sup>

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<sup>4</sup> 322 Ark. 517, 910 S.W.2d 215 (1995).

<sup>5</sup> *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984).

<sup>6</sup> *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987)

<sup>7</sup> *Chatelain*, at 524.

<sup>8</sup> *Chatelain*, at 525.

<sup>9</sup> *Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609 (E.D. Ark. 1994), *aff'd*, *Little Rock Family Planning Servs. v. Dalton*, 60 F.3d 497 (8th Cir. 1995) (holding that Amendment 68's prohibition of the use of public funds for abortions except to save the mother's life violated the federal Medicaid statute, as amended by the 1994 Hyde Amendment, and was invalid under the supremacy clause).

<sup>10</sup> *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 134 L. Ed. 2d 115, 116 S. Ct. 1063 (1996).

<sup>11</sup> *AKA Supra*. at 640, 641 ( The court also noted that during the pendency of the case the legislature had amended the criminal statute to include "Unborn child" means a living fetus of twelve (12) weeks or greater gestation. ACA 5-1-102(13) (B) (i) (b).).

In the same spirit of abortion restriction, Amendment 68 of the Arkansas Constitution prohibits the use of public funding for abortion, with an exception for abortions performed to save the life of the mother.<sup>12</sup> This amendment was passed after a number of attempts, and after the language of the amendment was watered down significantly from the originally proposed language. After two unsuccessful attempts to write an pro-life amendment into the Arkansas Constitution, abortion opponents were forced into a compromise, albeit a tough one, on the language of Amendment 68.

The *1984 Unborn Child Amendment* mandated that "no public funds of this state shall be used directly or indirectly to pay for all or any part of the expenses of performing or inducing an abortion, unless such abortion is for the purpose of saving the mother's life." The proposed amendment was struck from the ballot in a split decision by the Arkansas Supreme Court which held that the issue's popular name, the *Unborn Child Amendment*, was misleading and "convey[ed] a biased view of the merits of the proposal."<sup>13</sup>

Pro-Life forces came back with the *1986 Limitation on Abortion and Abortion Funding Amendment*. This proposal essentially was the *Unborn Child Amendment* under a new popular name. It, too, would have prohibited the use of taxpayer funds, whether directly or indirectly, for the performance of an abortion except to save the mother's life. The proposal was narrowly defeated at the polls, officially by only 519 votes.

Pro- Life forces returned again in 1988 with a new proposal. This new proposal, Amendment 68, was approved in its current form by a margin of almost 30,000 votes.<sup>14</sup>

The court in *Unborn Child Amendment Comm. v. Ward*<sup>15</sup> used this history to hold that there was no *per se* constitutional violation where an abortion was performed in a public hospital or by a public employee. As a result, the amendment only prohibits the direct funding of abortions.

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<sup>12</sup> Ark. Const. Amendment 68, § 1.

<sup>13</sup> Arkansas Women's Political Caucus v. Riviere, 283 Ark. 463 (Ark. 1984)

<sup>14</sup> *Arkansas Democrat-Gazette* (Oakley) May 11, 1997.

<sup>15</sup> 328 Ark. 454 (1997).

In the Federal Courts, Amendment 68 was subsequently declared unconstitutional and unenforceable in *Little Rock Family Planning Servs. v. Dalton*.<sup>16</sup> The United States Court of Appeals for the Eighth Circuit affirmed the district court's order enjoining enforcement of Amendment 68 in its entirety. Ultimately, the Eighth Circuit and U.S. District Court decisions were, in relevant part, reversed by the United States Supreme Court. In *Dalton v. Little Rock Family Planning Services*,<sup>17</sup> the United States Supreme Court held that, in a pre-emption case such as a case in which a state constitutional amendment restricting state funding for abortions is alleged to conflict with federal law concerning Medicaid funding, state law is displaced only to the extent that the state law actually conflicts with federal law.

In *Hodges v. Huckabee*,<sup>18</sup> plaintiff sued for an injunction directing the removal of the state from the federal and state Medicaid programs. Appellant based her request on the fact that the federal program provided for abortions in the case of rape or incest and the state constitution only allowed public funds to be used for abortion to save the mother's life. Appellant claimed withdrawal was necessary to resolve the conflict. The lower court granted the state summary judgment. In affirming the decision, the court ruled that the plain language of Amendment 68 showed it was intended to be effective only to the extent possible under the limitations of the supremacy clause of the United States Constitution. The amendment was ruled null and void to the extent it prohibited state funds to pay for abortions for Medicaid eligible victims of rape or incest.

In addition to its stated policy in the Arkansas Constitution, Arkansas has a comprehensive and robust statutory framework which regulates abortion to the greatest extent possible by establishing legal protections for women seeking abortion which have been determined to be constitutional by the United States Supreme Court.

Arkansas' legal requirement that abortions be performed by licensed medical practitioners only<sup>19</sup> provides that it is "unlawful for any person to induce another person to have

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<sup>16</sup> 860 F. Supp. 609 (E.D. Ark. 1994), *aff'd*, *Little Rock Family Planning Servs. v. Dalton*, 60 F.3d 497 (8th Cir. 1995).

<sup>17</sup> 516 U.S. 474, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996).

<sup>18</sup> 338 Ark. 454 (Ark. 1999).

<sup>19</sup> ACA § 5-61-101.

an abortion or to willfully terminate the pregnancy of a woman known to be pregnant with the intent to cause fetal death unless the person is licensed to practice medicine in the State of Arkansas.” Violation of the statute is a Class D felony. Additionally, as do all the Arkansas statutes that intend to regulate abortion, it provides that “[n]othing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.”

Arkansas’ abortion statute provides that “[i]t is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.”<sup>20</sup> This section was held unconstitutional as applied to physicians in *Smith v. Bentley*.<sup>21</sup> It has been held to be constitutional as applied to laymen in *May v. State*.<sup>22</sup> In that case, defendant was charged with arranging an abortion. The court held that defendant did not have standing to attack the constitutionality of the Act because defendant was not a physician and therefore the statute was constitutional as applied to him.

A more comprehensive statute was passed in 1985 and amended in 2006. Section 703 of this statute provides that a fetus shall be presumed not to be viable prior to the end of the twenty-fifth week of the pregnancy.<sup>23</sup>

Section 705 states that “no abortion of a viable fetus shall be performed unless necessary to preserve the life or health of the woman.” Before a physician may perform an abortion upon a pregnant woman after such time as her fetus has become viable, the physician shall first certify in writing that the abortion is necessary to preserve the life or health of the woman, and shall further certify in writing the medical indications for the abortion and the probable health consequences. Section 705 also provides an exception for pregnancy resulting from rape or incest perpetrated on a minor.<sup>24</sup>

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<sup>20</sup>ACA § 5-61-102.

<sup>21</sup>493 F. Supp. 916 (E.D. Ark. 1980).

<sup>22</sup> 254 Ark. 194 (1973).

<sup>23</sup>A.C.A. § 20-16-701 *et. sec.*

<sup>24</sup> A.C.A. § 20-16-705 (b).

Where an abortion is performed on a viable fetus, the act requires that the method of abortion used must be the type most likely to preserve the life of the fetus, provided the method chosen does not pose a greater health risk to the mother. Furthermore, in all cases in which the physician performs an abortion upon a viable fetus, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.<sup>25</sup> An additional physician must be present to provide medical care to the fetus should it survive the abortion.<sup>26</sup>

The state of Arkansas has also passed a comprehensive *Woman's Right to Know Act of 2001*.<sup>27</sup> The act requires that “[n]o abortion shall be performed in this state except with the voluntary and informed consent of the woman upon whom the abortion is to be performed.”<sup>28</sup> Except in the case of a medical emergency, a woman must be told the following: the name of the physician who will perform the abortion; the medical risks associated with the particular abortion procedure to be employed; the probable gestational age of the fetus at the time the abortion is to be performed; the medical risks associated with carrying the fetus to term; that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care; that the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and that she has the option to review the printed or electronic materials described in § 20-16-904. These printed or electronic materials are to be prepared by the Division of Health of the Department of Health and Human Services<sup>29</sup>

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<sup>25</sup>A.C.A. § 20-16-706.

<sup>26</sup>A.C.A. § 20-16-707.

<sup>27</sup>A.C.A. § 20-16-90.

<sup>28</sup>A.C.A. § 20-16-90.

<sup>29</sup>A.C.A. § 20-16-904 (2006).

(a) The Division of Health of the Department of Health and Human Services shall cause to be published in English and in each language which is the primary language of two percent (2%) or more of the state's population and shall update on an annual basis the following printed materials in such a way as to ensure that the information is easily comprehensible:

(1) At the option of the division:

(A) Geographically indexed materials designed to inform the woman of public and private agencies, including adoption agencies, and services available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including:

- (i) A comprehensive list of the agencies available;
- (ii) A description of the services they offer; and
- (iii) A description of the manner, including telephone numbers, in which they might be contacted; or

To further assure that women are provided with all the information they should have before deciding to have an abortion, Arkansas has also established that women have a statutory right to view an ultrasound image of their unborn child prior to abortion. The statute that requires that “[a]ll physicians who use ultrasound equipment in the performance of an abortion shall inform the woman that she has the right to view the ultrasound image of her unborn child before an abortion is performed.”<sup>30</sup>

Finally, Arkansas’ *Unborn Child Pain Awareness and Prevention Act*<sup>31</sup> provides a comprehensive set of notices that must be given to a woman seeking an abortion informing her of the pain that can be experienced by a fetus of 20 gestational weeks or more, that anesthetics and analgesics can be administered, and of the risks associated with same. Once again, medical emergencies are excepted from these requirements. Section 1109 provides for disciplinary action before the state medical board for violations, and section 1110 provides for the bringing of a civil action against a physician who violates the act by: (1) any person upon whom the abortion was

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- (B) Printed materials, including a toll-free telephone number which may be called twenty-four (24) hours per day to obtain orally a list and description of agencies in the locality of the caller and of the services they offer; and
- (2) (A) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the fetus at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including:
- (i) Any relevant information on the possibility of the fetus' survival; and
  - (ii) Pictures or drawings representing the development of fetuses at two-week gestational increments, provided that the pictures or drawings shall describe the dimensions of the fetus and shall be realistic and appropriate for the stage of pregnancy depicted.
- (B) The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the fetus at the various gestational ages.
- (C) The material shall also contain objective information describing:
- (i) The methods of termination of pregnancy procedures commonly employed;
  - (ii) The medical risks commonly associated with each of those procedures;
  - (iii) The possible detrimental psychological effects of termination of pregnancy; and
  - (iv) The medical risks commonly associated with carrying a child to term.
- (b) The materials referred to in subsection (a) of this section shall be printed in a typeface large enough to be clearly legible.
- (c) The materials required under this section shall be available at no cost from the division and shall be distributed upon request in appropriate numbers to any person, facility, or hospital.
- (d) (1) The division shall develop and maintain a secure website to provide the information described under subsection (a) of this section.
- (2) The website shall be maintained at a minimum resolution of 72 pixels per inch.

<sup>30</sup> A.C.A. § 20-16-602.

<sup>31</sup> A.C.A. § 20-16- 1101 et. Seq.

performed; (2) the father of the unborn child who was the subject of the abortion; or (3) a grandparent of the unborn child who was the subject of the abortion.

### **Parental Consent**

Arkansas has a parental consent statute<sup>32</sup> that provides: “Except as otherwise provided in § 20-1-804 and 20-16-805, no person may perform an abortion upon an unemancipated minor or upon a woman for whom a guardian or custodian has been appointed because of a finding of incompetency unless the person or the person's agent first obtains the written consent of either parent or the legal guardian or custodian.”

Section 804 provides for judicial by-pass and section 805 is the medical emergency exception. Section 808 provides an exception where both parents are deceased, or where there is only one parent living and the minor signs an affidavit stating that “the parent has committed incest with the minor, has raped the minor, or has otherwise sexually abused the minor.”

As do almost all the Arkansas statutes which regulate abortion, this statute requires reports to be filed by the abortion providers. In this case, the statute requires that “in addition to other information reported by an abortion provider to the Division of Health of the Department of Health and Human Services, the following information shall be reported for each induced termination of pregnancy: (1) Whether parental consent was required; (2) Whether parental consent was obtained; and (3) Whether a judicial bypass was obtained.”<sup>33</sup>

The statutes discussed above often have or can have civil actions associated with them. Where that is the case, the statutes provide for the filing of the complaint in such away as to protect the anonymity of the plaintiff. For instance, A.C.A § 20-16-804 (2) (B) states: “The minor or incompetent person shall have the right to file her petition in the circuit court using a pseudonym or using solely her initials.” A.C.A § 20-16-1111 provides that in a civil or criminal action involving an abortion performed on a woman, the court must make a determination pursuant to a motion as to whether the woman’s anonymity should be preserved in the litigation. Naturally, the woman does have the ability to consent to her identity being disclosed.

### **Protection of the Unborn from Criminal Violence**

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<sup>32</sup> A.C.A § 20-16-801.

<sup>33</sup> A.C.A § 20-16-810.

In the case of *Meadows v. State*,<sup>34</sup> the Supreme Court of Arkansas declined to judicially adopt a definition of "personage" that would include a fetus.<sup>35</sup> In *Meadows*, the defendant Robert Keith Meadows was driving while intoxicated and in a reckless manner. Veering across the center line, he struck an oncoming vehicle driven by Randy Waldrip. Waldrip was killed in the accident. Meadows' passenger, Vanessa Weicht, sustained injuries resulting in the death of her unborn child. She was two weeks overdue at the time of the accident.<sup>36</sup> Meadows was charged and convicted of two counts of manslaughter, one for the death of Waldrip and one for the death of Weicht's unborn child.<sup>37</sup>

The manslaughter statute under which Meadows was charged provided that one commits manslaughter if he "recklessly causes the death of another person."<sup>38</sup> The statute failed to define the word "person."<sup>39</sup> Meadows argued that the reckless killing of an unborn viable fetus was "not included within the purview of the manslaughter statute."<sup>40</sup> The Supreme Court of Arkansas refused to create a new common law crime, stating that to do so would be a violation of Meadows' right of due process.<sup>41</sup> The court also stated that it would be counter to legislative intent to adopt a definition of "person" that would include a fetus because the legislature had expressly repealed an early Arkansas feticide statute in 1975.<sup>42</sup>

The Arkansas legislature ultimately responded to the Supreme Court of Arkansas' deference by passing the Fetal Protection Act.<sup>43</sup> By passing the Act, Arkansas has joined the

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<sup>34</sup>*Meadows v. State*, 291 Ark. 105 (1987).

<sup>35</sup>*Id.* at 105.

<sup>36</sup>*Id.* at 111.

<sup>37</sup>*Id.* at 105.

<sup>38</sup> Ark. Stat. Ann. 41-1504(1) (c) (1977) (recodified at Ark. Code Ann. 5-10-104 in 1987).

<sup>39</sup> *Meadows, supra.* at 107.

<sup>40</sup> *Id.*

<sup>41</sup>*Id.* at 109.

<sup>42</sup>*Id.* at 111.

<sup>43</sup> ACA 5-1-102(13).

(A) "Person", "actor", "defendant", "he", "she", "her", or "him" includes:

(i) Any natural person; and

(ii) When appropriate, an "organization" as defined in § 5-2-501.

(B) (i) (a) As used in §§ 5-10-101 - 5-10-105, "person" also includes an unborn child in utero at any stage of development.

(b) "Unborn child" means a living fetus of twelve (12) weeks or greater gestation.

growing number of states that have either adopted "feticide" statutes or that have judicially determined that the word "person" applies to a fetus for the purposes of their homicide statutes.<sup>44</sup>

The new wrongful death action created by the legislature was soon challenged. In *Bullock v. State*,<sup>45</sup> the defendant attacked the constitutionality of Act 1273 of 1999, the Arkansas Fetal Protection Act.<sup>46</sup> He maintained that because the Act did not relate to the viability of a fetus, it was unconstitutional. In addition, the defendant argued that because the fetus was conceived prior to the enactment of Act 1273, and because he was the first individual to be prosecuted under the act, the law as applied to him is in violation of due process. The court refused to reach the merits of defendant's arguments ruling that where defendant failed to present a record or abstract on appeal that informed the appellate court of the arguments made below; failure to produce a critical document on appeal precluded the appellate court's consideration of any constitutional issues.

In *Chatelain v. Kelley*,<sup>47</sup> a patient was admitted to a hospital for delivery of her baby. A doctor performed an emergency cesarian section on the patient. The patient alleged that her child was stillborn due to a delay in a cesarian section operation. The court had to determine whether a fetus was a person for purposes of the Arkansas wrongful death statute.<sup>48</sup>

The court discussed its holding in *Meadows v. State*,<sup>49</sup> where it had held that a fetus was not a person for the purposes of the manslaughter laws. The court then went on to say that "[w]e

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(ii) This subdivision (13)(B) does not apply to:

(a) An act that causes the death of an unborn child in utero if the act was committed during a legal abortion to which the woman consented;

(b) An act that is committed pursuant to a usual and customary standard of medical practice during diagnostic testing or therapeutic treatment; or

(c) An act that is committed in the course of medical research, experimental medicine, or an act deemed necessary to save the life or preserve the health of the woman.

(iii) Nothing in this subdivision (13) (B) shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

<sup>44</sup> 54 Ark. L. Rev. 75 at 139 (Robbins).

<sup>45</sup> *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003).

<sup>46</sup> A.C.A. § 5-1-102 (Supp. 1999).

<sup>47</sup> *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995).

<sup>48</sup> A.C.A. § 16-62-102

<sup>49</sup> *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987).

are reluctant to create an inconsistency in the laws of this State by holding "person" includes viable fetus for the purpose of the wrongful death statute when we have reached the contrary conclusion in the criminal law and the law of probate.”<sup>50</sup> As noted above, *Chatelain* was overruled in *Phillip v. Jefferson Hosp. Ass'n, Inc.*<sup>51</sup>

The other case of note dealing with the status of a fetus in civil actions is *Ark. Dep't of Human Servs. v. Collier*.<sup>52</sup> Petitioner State Department of Human Services (DHS) petitioned the court for a writ of prohibition or, in the alternative, for a writ of certiorari, vacating the order of the Faulkner County Circuit Court, AR, in which an unborn fetus was declared to be dependent-neglected and placed the fetus in DHS's custody. Respondent judge opposed the petitions. The case turned on the interpretation of juvenile in A.C.A § 9-27-303(29) (A). The court held that “[i]n a court's judgment, the language of Ark. Code Ann. § 9-27-303(29) (A) is plain and unambiguous, and it clearly defines "juvenile" as an individual from "birth to age eighteen." An unborn fetus obviously does not fall within this definition as by its very nature, there has been no birth.”<sup>53</sup>

### **Healthcare Rights of Conscience**

In Arkansas, doctors, nurses and other medical professionals are provided legal protection when they refuse to perform, participate, and consent to medical procedures which result in the termination of pregnancy.<sup>54</sup> They cannot be subjected to any criminal, civil, or disciplinary actions. Similarly, no hospital, hospital director, or governing board can be forced to permit abortion within its institution.

Under Arkansas law, the refusal of any person to submit to an abortion or to give consent for an abortion cannot be grounds for the loss of any privileges or immunities to which the person would otherwise be entitled. Submission to an abortion or the granting of consent for an abortion can not be a condition precedent to the receipt of any public benefits.<sup>55</sup>

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<sup>50</sup> *Chatelain, supra.* at 525

<sup>51</sup> 344 Ark. 627 (2001)

<sup>52</sup> *Ark. Dep't of Human Servs. v. Collier* 351 Ark. 506 (2003)

<sup>53</sup> *Id.* at 518

<sup>54</sup> A.C.A § 20-16-601

<sup>55</sup> A.C.A. § 20-16-601

This language was part of the statute challenged in *Smith v. Bentley*.<sup>56</sup> The Federal District Court held that, although physicians who desire to render abortions without the restraints imposed by statute had standing to challenge the constitutionality of § 5-61-102, they did not have standing to challenge the constitutionality of A.C.A. § 20-16-601<sup>57</sup> as this statute is not a penal statute, but deals exclusively with immunity from civil liability or loss of public benefits and thus, this section was severable from the provisions of other statutes challenged by the physicians.

The statute does not expressly address the rights of pharmacists to refuse to dispense abortifacients and the courts of Arkansas have not addressed this specific issue but the wording of the above referenced legislation appears to be broad enough to afford pharmacists that protection.

### **Cloning and Embryo Research**

Cloning and other forms of embryonic research are addressed by A.C.A. § 20-16-1001 *et. seq.* The statute makes it is unlawful for any person or entity, public or private, to intentionally or knowingly engage in any activity having anything to do with human cloning.<sup>58</sup> Additionally, it contains criminal penalties for various violations as well as civil fines. Section 1003 clarifies that the legislation does not apply to scientific research or invitro fertilization not meant to clone a human being.

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<sup>56</sup> *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

<sup>57</sup> Formerly A.C.A. § 41-2560

<sup>58</sup> Section 1002 states (a) It is unlawful for any person or entity, public or private, to intentionally or knowingly: (1) Perform or attempt to perform human cloning; (2) Participate in an attempt to perform human cloning; (3) Ship, transfer, or receive for any purpose an embryo produced by human cloning; or (4) Ship, transfer, or receive, in whole or in part, any oocyte, embryo, fetus, or human somatic cell for the purpose of human cloning.

(b) A violation of subdivision (a) (1) of this section or a violation of subdivision (a) (2) of this section, or both, is a Class C felony.

(c) A violation of subdivision (a) (3) of this section or a violation of subdivision (a) (4) of this section, or both, is a Class A misdemeanor.

(d) (1) In addition to any criminal penalty that may be levied, any person or entity that violates any provision of this section shall be subject to a fine of not less than two hundred fifty thousand dollars (\$250,000) or two (2) times the amount of any pecuniary gain that is received by the person or entity, whichever is greater.

(2) All fines collected shall be placed into the general revenues of the State of Arkansas.

Arkansas does not appear to have a statute which bans stem cell research. However, in March of 2007, legislation was passed which encourages the use of non- embryonic stem cells for research and which created the Newborn Umbilical Cord Blood Initiative, which shall establish a network of postnatal tissue and fluid banks in partnership with one or more public or private colleges or universities, public or private hospitals, nonprofit organizations, or private firms in Arkansas for the purpose of collecting and storing postnatal tissue and fluid.<sup>59</sup>

### **Assisted Suicide**

Arkansas' Physician Assisted Suicide statute<sup>60</sup> prohibits a physician or other health care provider from assisting a person to end their life. Violation of the statute is a class c felony. The Act specifically provides that nothing therein prevents a physician or health care provider from carrying out an advanced directive or living will, or prevents a physician from prescribing any drug, compound, or substance for the specific purpose of pain relief.

Additionally, as part of the *Omnibus Long-Term Care Reform Act of 1988*,<sup>61</sup> the State of Arkansas addressed under what conditions nutrition and hydration may be withheld from long term care residents, including withholding or withdrawing at the directive or with the consent of the resident;<sup>62</sup> pursuant to a validly executed declaration as defined by the act;<sup>63</sup> or pursuant to the directions of an attorney-in-fact appointed under a validly executed durable power of attorney for health care,<sup>64</sup> as well as when another person is authorized to execute a written request for another<sup>65</sup>

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<sup>59</sup> A.C.A. § 20-8-501 et. seq.

<sup>60</sup> A.C.A. § 5-10-106.

<sup>61</sup> A.C.A. § 20-10-1001.

<sup>62</sup> A.C.A. § 20-10-1010.

<sup>63</sup> A.C.A. § 20-17-201 (deals with advanced healthcare directives or what is commonly referred to as living wills).

<sup>64</sup> A.C.A. § 20-13-104

<sup>65</sup> A.C.A. § 20-17-214 (if resident did not execute a declaration; and if, in the opinion of the attending physician, the resident is no longer able to make health care decisions for himself or herself).

In this legislation the state has recognized the vulnerability of residents of long-term care facilities. The purpose of the Act is to “ensure proper care and treatment of these individuals, particularly at end-of-life, the circumstances and conditions under which the withholding of nutrition, hydration, or both, may occur, be clarified.”<sup>66</sup>

Arkansas is obviously a state with a strong pro-life culture. The Arkansas Legislature has developed a comprehensive and well thought out statutory scheme that protects life both at the beginning and at the end, our two most vulnerable times. Their legislation has been carefully crafted to withstand judicial scrutiny and offer the maximum amount of protection to life that is possible under current constitutional jurisprudence. The Arkansas legislation can serve as a model for other states to adopt.

The record of the Arkansas courts has been slightly mixed. As explored in more detail below more often than not they seek to avoid ruling on controversial life issues. However it can not be said that the court has been hostile to life issues.

## II. JUDICIAL RESTRAINT

First it should be noted that Justices of the Arkansas Supreme Court are not appointed, but are elected to their positions. This would obviously attune them to the feelings of the electorate, particularly on issues where there is a strong consensus within the state. As expressed by the legislation that has been passed in Arkansas, there is obviously a strong consensus to limit abortion to the greatest extent legally possible.

These facts would explain why the Arkansas Courts appear to have a long history of avoiding deciding controversial life issues by disposing of the cases on procedural grounds.

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<sup>66</sup> Acts 2003, No. 1322, § 6 (legislative Purpose)

For instance, in *Ehlebracht v. Dailey*,<sup>67</sup> where the plaintiff alleged that the City of Little Rock was using public funds to maintain an employee group health insurance plan in violation of Amendment 68, the court dismissed the case on the grounds that the plaintiff failed to produce proof that public funds were being used in that manner. While this is a lower appellate court, it does illustrate the tendency of the Arkansas court system.

The court relied on the doctrine of standing in *May v. State*.<sup>68</sup> There, the court held that the defendant did not have standing to attack the constitutionality of a statute prohibiting him from inducing an abortion because defendant was not a physician, and the statute was constitutional as applied to him, even if not constitutional as applied to physicians.

In *Bullock v. State*,<sup>69</sup> the appellant Bullock had been found guilty of killing an unborn child. He attacked the constitutionality of Act 1273 of 1999, the *Arkansas Fetal Protection Act*,<sup>70</sup> claiming that because the Act did not relate to the viability of a fetus, it was unconstitutional. The court ruled that:

We will not consider arguments, even constitutional ones that are made for the first time on appeal. The record fails to reveal what arguments were made below, and as such we do not know if Bullock's arguments on appeal were first presented to the circuit court. In addition, it is the appellant's duty to present a record on appeal demonstrating error. Bullock failed to present a record or abstract on appeal that informs this court of the arguments made below. Failure to produce a critical document on appeal precludes our consideration of any issue concerning it. Thus, we

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<sup>67</sup>2003 Ark. App. LEXIS 352 (Ark. Ct. App. 2003).

<sup>68</sup> 254 Ark. 194 (Ark. 1973).

<sup>69</sup> *Bullock v. State*, 353 Ark. 577 (2003).

<sup>70</sup> Ark. Code Ann. § 5-1-102.

are precluded from reaching the merits of his constitutional claims.  
(citations omitted)<sup>71</sup>

In both *Cockrum v. Fox*<sup>72</sup> and *Conner v. Simes*,<sup>73</sup> the court avoided ruling on whether a fetus was a person for purposes of the wrongful death statute by ruling that the writ of prohibition being sought by the appellant was improper.

Based on some recent decisions involving areas other than the sanctity of life, there is evidence that the court is moving in a more activist direction. This is illustrated by how the court has handled two issues which are controversial in Arkansas, as they are in a number of jurisdictions: homosexual rights and funding for schools.

In *Jegley v. Picado*,<sup>74</sup> the court struck down the states criminal sodomy statute. The decision was based on a broad expansion of privacy rights and equal protection under the Arkansas Constitution. Justices Thornton and Arnold, who both no longer sit on the bench, dissented on the procedural ground that there was no justiciable controversy before the court because the state had not attempted to enforce the statute against anyone.<sup>75</sup>

In *Dep't of Human Servs. v. Howard*,<sup>76</sup> the court reviewed the validity of a rule which prohibited homosexuals from being foster parents. The court held that the Arkansas General Assembly did not include, under Ark. Code Ann. § 9-28-405(c) (1), the promotion of morality in its delegation of power to the Arkansas Child Welfare Agency Review Board. Consequently, the Board was acting outside its areas of responsibilities when it enacted § 200.3.2 of the Minimum Licensing Standards for Child Welfare Agencies, and was in violation of the separation-of-powers doctrine.<sup>77</sup> The court also upheld factual findings of the lower court that “there is no correlation between the health, welfare, and safety of foster children and the blanket exclusion of

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<sup>71</sup> *Bullock, supra.* at 585.

<sup>72</sup> *Cockrum v. Fox*, 359 Ark. 508 (2004).

<sup>73</sup> *Conner v. Simes*, 355 Ark. 422 (2003).

<sup>74</sup> *Jegley v. Picado*, 349 Ark. 600 (2002).

<sup>75</sup> *Id.* at 641.

<sup>76</sup> *Dep't of Human Servs. v. Howard*, 2006 Ark. LEXIS 418 (2006).

<sup>77</sup> *Id.* at 18.

any individual who is a homosexual or who resides in a household with a homosexual.”<sup>78</sup> This decision was unanimous, with Justice Brown concurring but arguing that the regulation should also be ruled invalid on the grounds that it violates the equal protection and privacy rights of homosexuals.<sup>79</sup> It should be noted that the court could have refused the case for lack of standing, but instead found standing even though the plaintiff had not applied for a license to be a foster parent. These cases lead to the conclusion that the court may be moving away from avoiding controversial issues on procedural grounds, and that they are exercising less judicial restraint.

There has also been substantial litigation in Arkansas regarding school funding. In *Lake View Sch. Dist. No. 25 v. Huckabee*,<sup>80</sup> the school district’s core assertions were that the Arkansas General Assembly reneged on its legislative commitments and failed to comply with landmark legislation. The supreme court considered the following issues: (1) the supreme court's jurisdiction to hear the motions; (2) whether the legislature at its 2005 regular session retreated from its prior actions to comply with the supreme court's directives; (3) whether the foundation-funding levels for the next biennium assured a continual level of adequate funding for Arkansas students; and (4) whether the legislature's commitment to facilities funding met the adequacy criterion. The supreme court's determination that Arkansas' public school funding system did not pass constitutional muster dated back 22 years. The majority opinion for the 4-3 ruling was written by Associate Justice Robert L. Brown, and concurred with by Associate Justice Tom Glaze and Associate Justice Betty Dickey. A concurring opinion written by Associate Justice Glaze was also signed-off on by Associate Justice Dickey and Associate Justice Don Corbin.

Justice Brown's majority opinion directed the court's special masters Bradley Jesson and David Newbern, both former members of the court, to determine whether the court has jurisdiction to continue to pursue the case; whether the 85th General Assembly "retreated from its prior actions to comply with this court's directives;" whether school funding for the next biennium is adequate; and whether the legislature as adequately funded school facilities needs."

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<sup>78</sup> *Id.* at 16.

<sup>79</sup> *Id.* at 19.

<sup>80</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, 362 Ark. 520 (2005).

The Masters are authorized to examine and evaluate the issues listed in this opinion, but also any other issue they deem relevant to constitutional compliance."<sup>81</sup>

The dissent to the court's majority opinion written by Chief Justice Jim Hannah, new Associate Justice Jim Gunter, and Special Justice Carol Dalby joined in the dissent. Justice Hannah's dissent is a robust and entertaining defense of judicial restraint:

While I understand and share the desire to assure that a constitutional system of public education is attained, the desire to see that the legislature does so is hardly a basis of jurisdiction. Neither does a fair warning that the court may act give rise to jurisdiction. Yet the majority asserts that it has jurisdiction, giving a meaning to the word jurisdiction heretofore unknown. I am confused, although I am reminded of Alice and Humpty Dumpty in *Through the Looking Glass*. In conversation with Alice, Humpty Dumpty stated, "There's glory for you." Alice was confused by the use of the word "glory."

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't - till I tell you. I meant 'there's a nice knock down argument for you!'"

"But 'glory' doesn't mean 'a nice knock down argument for you,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean-neither more nor less."

"The question is," said Alice, "whether you can make the words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all"

Lewis Carroll, *The Complete Illustrated Lewis Carroll 196* (New York: Gallery Books, 1991). It appears that this court is assuming jurisdiction just because we choose to say we can. (emphasis added)<sup>82</sup>.

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<sup>81</sup> *Id* at 525.

As biting as Justices Hannah's comments are, the concurring dissent by Justice Gunter is a more forceful defense of judicial restraint and deserves to be quoted in its entirety:

The government of Arkansas has been delegated by the people to three separate departments: the Legislative Department, the Executive Department, and the Judicial Department. See Ark. Const. Art. 4. Each department has been granted certain powers, and "[n]o person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ark. Const. Art. 4, § 2. Had the people wanted this court to run the school system and to disregard the legislature's efforts, there would have been plain language to that effect in our constitution. There is not; so the majority relies on its own creation of authority to act. By our repeated recall of the mandate, we have announced our authority and intent to review each session of the legislature in sweeping fashion. Our action may be interpreted as bullying the legislature to spend more on an area of government that we favor most for the moment. Every legislative session benefits some educational groups or districts and disadvantages others. While we may receive accolades from those who benefit from our decision, it is not this court's role to make these decisions, whether directly or indirectly. The majority is setting this court up to perform a perpetual review of the State's educational policy. In addition to being outside of our power and authority, this solution is simply unworkable.

We have been insensitive to the people of Arkansas by casting shadows on their selected representatives in the General Assembly. We have assumed the position of grading the financial decisions of the body charged with running the entire state on a limited budget. If that were not enough, we have decided to

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<sup>82</sup> *Id.* at 528.

evaluate these decisions before the General Assembly's solution has even been placed into action.

In my opinion, instead of building more power for the court, we should exercise judicial restraint. We should leave the power in the hands of the people. We should leave education in the hands of the legislature. We should demonstrate that we respect the power of the people to entrust decisions to their elected representatives, thereby allowing government by the people and for the people. We should adhere to the fundamental system of government established in our constitution, which relies on three distinct and separate branches. We should limit the exercise of our power to the Judicial Department.<sup>83</sup>

These cases, while not dealing with life issue, illustrate a disturbing trend of the majority of the court moving in a more activist direction. This appears to be a recent development and it is as of yet too early to tell if the citizens of Arkansas will demand judges who maintain judicial restraint. As challenges to the pro-life legislation are rare and the legislation is carefully crafted to withstand constitutional scrutiny, it may be that this judicial movement may have little impact on the culture of life that exists in Arkansas.

### **III. THE COURT**

The Arkansas Constitution of 1874 was amended in 1924 to provide for five Arkansas Supreme Court judges. Amendment 9 also allowed the Arkansas General Assembly to increase the number to seven judges, which it did by Act 205 of 1925. Article 7, §6 of the Arkansas Constitution describes the qualifications for a Arkansas Supreme Court judge, as follows: “They must be a minimum of 30 years old of good moral fiber, a resident of the state for at least two years, a citizen of the United States and a practicing lawyer for at least eight years or

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<sup>83</sup> *Id* at 535,536.

whose service upon the bench of any court of record, when added to the time he may have practiced law, shall be equal to eight years.”

The seven Arkansas Supreme Court judges are elected in state-wide non-partisan races, and serve staggered terms. Their term of office is for eight years. Should a vacancy occur the unexpired term is filled by appointment of the Governor.

**Biographical information of the current members of the Arkansas Supreme Court**

<b>Member</b>	<b>Appointed by / Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
Chief Justice Jim Hannah	Elected / 2000 Appointed Chief Justice / 2004	2008	-Biographical Information: B.S.B.A. (Accounting), University of Arkansas; J.D., University of Arkansas; City Attorney for Augusta, Bradford, Des Arc, Garner, Kensett, and Rosebud; Deputy Prosecuting Attorney for Woodruff County; Searcy City Attorney, 1969-1978; White County Juvenile Judge, 1976-1978; Chancery/Probate Judge, 17th Judicial District, 1979-1999; Associate Justice, Arkansas Supreme Court, Position 5, 2001- 2004; Faculty Advisor, National Judicial College; Treasurer and Secretary, Arkansas Board of Pardons and Paroles (Secretary 1972-1979); -Professional/social affiliations: Member, Arkansas Judicial Council; Member, Arkansas Bar Association; Democrat.

Justice Jim Gunter	Elected / 2004	2012	<p>-Biographical information: B.B.A., Texas A&amp;M University; J.D., University of Houston; Prosecuting Attorney, 8th Judicial District, 1977-1982; Private practice, law office of John L. Wilson in Hope, AR, 1973; Private practice, Wilson and Gunter, 1974; Private practice, Wilson, Gunter and Walker, 1975; Chancellor, 8th Judicial District, 1983-1991; Circuit/Chancery Judge, 8th Judicial District, 1991-1999; Circuit Judge, 8th Judicial District North, 1999-2004;</p> <p>-Professional/social affiliations: American Bar Association; Arkansas Bar Association; Southwest Arkansas Bar Association; Hempstead County Bar Association; Arkansas Judicial Council; Past President, Arkansas Supreme Court Civil Rules Committee; Arkansas Supreme Court Criminal Rules Committee; Arkansas Supreme Court Committee on Child Support; Criminal Detention Facility Board, Chair; Arkansas Judicial College, Education Committee; Alternate Dispute Resolution Committee.</p>
Justice Tom Glaze	Elected / 1987 Re-elected / 1994 Re-elected / 2002	2010	<p>-Biographical information: B.S., Business Administration, University of Arkansas, 1960; L.L.B., University of Arkansas</p>

			<p>School of Law, 1964; National Judicial College, 1978; The American Academy of Judicial Education, 1983; National Council of Juvenile and Family Court Judges Faculty Training Conference, 1985; Private Law Practice, and Chairman, The Election Laws Institute, Inc., 1970-1978; Assistant and Deputy Attorney General, Arkansas Attorney General's Office, 1967-1970; Staff Attorney, Pulaski County Legal Aid, 1966-67; Legal Advisor and Office Manager, Winthrop Rockefeller, 1965-1966; Executive Director, Election Research Council, Inc., 1965; Lecturer, University of Arkansas at Little Rock, 1971-1972, 1979-1980; Lecturer, University of Arkansas at Little Rock School of Law, 1981-1982, 1985, 1987; Judge, Arkansas Court of Appeals, 1981-1986; Chancellor, Sixth Judicial District, Third Division, 1979-1980;</p> <p>-Professional/social affiliations: Democrat.</p>
Justice Donald L. Corbin	<p>Elected / 1991  Re-elected / 1998  Re-elected / 2006</p>	2014	<p>- Biographical information: B.A., University of Arkansas at Fayetteville; J.D., University of Arkansas at Fayetteville; Served five terms in the Arkansas House of Representatives, 1971-1980; Practiced Law in DeQueen,</p>

			Arkansas, 1966-1967; Practiced law in Lewisville and Stamps, Arkansas, 1967-1981; Judge, Arkansas Court of Appeals, 1981-1990; Appointed Chief Judge in January 1987 and served in that capacity until 1990; - Professional/social affiliations: Democrat.
Justice Annabelle Clinton Imber	Elected / 1997 Re-elected / 1998 Re-elected / 2006	2014	- Biographical information: B.A., Smith College, 1971; J.D., University of Arkansas at Little Rock School of Law, 1977; Paralegal, Arnold, White & Durkee, Houston, Texas, 1972-1975; Paralegal, Wright, Lindsey & Jennings, Little Rock, Arkansas, 1975-1977; Attorney/Partner, Wright, Lindsey & Jennings, Little Rock, Arkansas, 1977-1988; Circuit Judge, 6th Judicial District, 5th Division, 1984; Chancery/Probate Judge, 6th Judicial District, 6th Division, 1989-1996; - Professional/social affiliations: Democrat
Justice Robert L. Brown	Elected / 1990 Re-elected / 1998 Re-elected / 2006	2014	- Biographical information: B.A., University of the South, Sewanee, Tennessee, 1963; M.A., Columbia University, 1965; J.D., University of Virginia, 1968; Deputy Prosecuting Attorney, 6th Judicial District, 1971-1972; Legal Aide, Governor of Arkansas Dale

			<p>Bumpers, 1972-1974; Legislative Assistant, Senator Dale Bumpers, 1975-1976; Administrative Assistant, Congressman Jim Guy Tucker, 1976-1978; Robert L. Brown, P.A., 1985-1990; Harrison &amp; Brown, P.A., 1979-1984; Adjunct Professor (National Government), U.A.L.R., 1984; Bar Review of Arkansas, 1979-1981; Chowning, Mitchell, Hamilton &amp; Burrow, 1968-1971;</p> <p>- Professional/social affiliations: Member, Pulaski County Bar Association; Member, American Bar Association; Arkansas Bar Foundation Fellow; American Bar Foundation Fellow; Democrat</p> <p>- Articles: <u>The Second Crisis of Little Rock</u>: A Report on Desegregation within the Little Rock Public Schools (Little Rock, AR: Winthrop Rockefeller Foundation, 1988); <u>From Whence Cometh Our Appellate Judges</u>: Popular Election Versus the Missouri Plan, 20:2 U.A.L.R. Law Journal 313 (Winter 1998); <u>Expanded Rights Through State Law</u>: The United States Supreme Court Shows State Courts the Way, 4:2 Journal of Appellate Practice and Process 499 (Fall 2002)</p>
Justice Paul	Elected / 2006	2014	- Biographical information: B.A., Florida

Danielson			State University, 1968; J.D., University of Arkansas School of Law, 1975; Law Clerk to Associate Justice Frank Holt of Arkansas Supreme Court; Deputy Prosecuting Attorney, 6th and 15th Judicial Districts; Booneville City attorney; Circuit Judge, 15th Judicial Circuit; Private law practice for 18 years; Instructor at University of Arkansas School of Law; Circuit Judge, 15th Judicial District (Conway, Logan, Scott & Yell Counties) for 12 years.
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## CONCLUSION

The Arkansas legislature exhibits a strong tendency to protect life at all stages to the greatest extent permitted by the law. Arkansas' judicial history has been mixed. At times the courts have exhibited hostility to the agenda of advancing procedural arguments to avoid ruling on life issues. At other times they have shown deference to the legislature. Recent decisions in other controversial areas indicate that the court is moving towards becoming a more activist court.